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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

	PAGE
SUPPLEMENTAL STATEMENT OF CASE CONCERNING EXTENSION OF STAY OF EXECUTION OF SENTENCE	1
ARGUMENT:	
Point I	2
Point II (a)	3
(b)	5
Point III (a)	7
(b)	9
CONCLUSION	10
APPENDIX AA:	
Application for Search Warrant	11
APPENDIX BB:	
Search Warrant	12
APPENDIX CC:	
Officer's Return to Warrant of Articles Seized	14
APPENDIX DD:	
Hudson County Clerk's Certification of Filing of Warrant, Application and Return	16
APPENDIX EE:	
Timetable of Relevant Proceedings	17
APPENDIX FF:	
Order of Trial Court of January 30, 1964, Extending Stay of Execution of Sentence	20

PAGE

Cases Cited

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837 (1963) 5

Hall v. Warden, Maryland Penitentiary, 313 F. 2d 483 (1963) 8

Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 726 (1963) 2, 3, 7

People v. Hurst, 325 F. 2d 891 (1963) 2, 3, 7, 8

State of New Jersey v. Calabro, 81 N. J. Super. 422 (1963) 5, 6

State of New Jersey v. Doyle, 40 N. J. 320 (1963) 6

State of New Jersey v. Smith, 37 N. J. 481 (1962) 4, 5

United States ex rel. Linkletter v. Walker, 323 F. 2d 11 (5th Cir. 1963) 2, 8

Weeks v. United States, 232 U. S. 383 (1914) 7

Wolf v. Colorado, 338 U. S. 25 ..... 2, 3

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

Supplemental Statement of Case Concerning Extension of Stay of Execution of Sentence

Because of printing difficulties, the Petition for Certiorari filed herein, was not filed by 5 P.M. on January 8th, 1964 but was filed at 9:01 A.M. on January 9th, 1964. Upon that fact being made known to the County Court of Bergen County, Law Division (Criminal), the Court entered a further order on January 30th, 1964, continuing the stay of

execution of sentence upon the two Defendants-Petitioners until "the Supreme Court of the United States acts upon the Petition for a Writ of Certiorari filed with it by said defendants, Harry J. Kaiser and Susan Kaiser, on January 9th, 1964." A copy of said order is made part of the supplemental appendix hereto and is printed as Appendix FF.

ARGUMENT

POINT I

Since the filing of this Petition for Certiorari on January 9th, 1964, there has been published in the Advance Sheets of February 17th, 1964 of the current decisions of the Circuit Courts of Appeals, a decision of the Ninth Circuit Court of Appeals in the case of *People of the State of California* v. *Hurst*, 325 F. 2d 891, which upholds the point Petitioners have been making since they first had an opportunity to raise it on the record made at the trial court, i.e. that the decision of the Supreme Court of the United States in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) should be given retroactive effect to "pre-*Mapp*" convictions in the State courts, where the evidence, under *Wolf* v. *Colorado*, 338 U. S. 25, and *Mapp* v. *Ohio*, *supra*, was illegally seized, in violation of the federally protected constitutional rights of the Petitioners under the IVth, XIVth and possibly the Vth Amendments of the Constitution of the United States.

In a well reasoned opinion the Court there considers all of the arguments, pro and con, which could be advanced on this question and particularly considers the reasoning relied upon by the Court in the case of *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963), a decision of the Fifth Circuit Court of Appeals, holding that no retroactive effect should be given to the *Mapp* holding to "pre-*Mapp*" convictions in the State courts regardless of how illegally the evidence was seized.

It is here urged that the decision in *People* v. *Hurst*, should become the accepted law of the land. Even in *Wolf* v. *Colorado, supra*, which did not, at the time it was decided, go so far as to require the State courts to apply the exclusionary bar to illegally seized evidence, it was held that the constitutional right of the defendants under the IVth Amendment to the Constitution of the United States was violated by the illegal *seizure* of the articles, later introduced into evidence. It was only the remedy to be afforded against such violations by State officers that was to be left to the several states to deal with separately. Regardless of how the State courts treated the illegally seized evidence, the injury of the violation persisted and was not dissipated by the State courts' actions; in some cases it was compounded.

The remedy afforded the citizens by the *Mapp* decision should not be limited to those violations of their constitutional rights that either occurred after the decision or occurring before the decision, were still to be urged at a later trial as a barring to the use of the fruits of the violation. The remedy afforded by *Mapp* should be extended to all violations, "pre-*Mapp*" violations and "post-*Mapp*" violations, where the reach of this court can still extend to remedy them.

POINT II

(a)

The State of New Jersey, as far as its Brief in opposition indicates, is still urging that these Petitioners should not have the conceded violations of their federally protected constitutional rights either considered or vindicated.

The sole basis of its argument to that effect is that these Defendants-Petitioners had an opportunity to raise the question of the invalidity of the search and seizure under

the search warrant (which is now conceded to have been issued improperly) at the time of argument of their appeal to the Appellate Division and at the time of Petitioning for Certification to the New Jersey Supreme Court. This is, and has been, the position of Judge GALANTI at the trial level; it is and has been the position of the Appellate Division of the Superior Court on the second appeal (A-158-62), and is the present position of the State of New Jersey, as far as its Brief reflects.

A thoughtful review of the State's position establishes these facts:

(a) that the State has not at anytime considered or determined the violation of the federally protected constitutional rights of the Petitioners on the merits.

(b) that on the *record which was before the Appellate Division* on the appeal from their conviction and which was the record in the New Jersey Supreme Court on their Petition for Certification (a record wholly devoid of any challenge to the warrant, the affidavit on which it issued, or to the admission at the trial of the illegally seized evidence), the point could not have been successfully raised, urged or argued as a ground for reversal in either court, that their federally protected constitutional rights against illegal search and seizure had been violated.

It was only when the Petitioners went back to the trial court after the denial of Certification by the Supreme Court of New Jersey, that the record, for the first time and then thereafter, reflected their asserted challenge to the violation of their rights under the IVth, Vth and XIVth Amendments. On the state of the record earlier, their argument on this point would have been unavailing *State* v. *Smith*, 37 N. J. 481, at bottom of pg. 489, the last New Jersey de-

cision prior to filing the Petition for Certification on June 25th, 1962.

To say now that the failure to raise that which was unavailable at the time of their appeal and at the time of their Petition for Certification, bars it from being raised now or at any other time, is, in effect, to say it can not be raised at all.

It was from this blind-alley reasoning that this Court decided the case of *Fay* v. *Noia*, 372 U. S. 391, 9 L. Ed. 2d 837 (1963).

It is from this same kind of reasoning that this Court should review the refusal of the State of New Jersey to afford any relief to Petitioners for the conceded violations of Petitioners' rights under the Constitution of the United States, which up until now have never been considered on their merits.

(b)

Following the filing of the Petition for Certiorari herein on January 9th, 1964, there was published in the Advance Sheets of January 10th, 1964, a decision of the Appellate Division of the New Jersey Superior Court entitled *State* v. *Calabro*, 81 N. J. Super. 422, decided on December 17, 1963.

In this latest case the Appellate Division shows an inclination to hold that the *Mapp* decision should have at least *some* retroactive effect to "pre-*Mapp*" convictions, where the affidavit for the search warant was deficient and the articles illegally seized under it were admitted into evidence at defendant's trial.

Earlier, in 1962, in *State* v. *Smith*, *supra*, the New Jersey Supreme Court was not ready to meet the question; at least where the record before them contained no showing

on the legality of the search and seizure. Now it is the Appellate Division, the same Court which would not hear Petitioner's claims in June of 1963, that is coming around to accept the idea that it was a constitutional *right* that was violated *when* the illegal search and seizure were made and the later admission into evidence at the trial, of the illegally secured articles was only a compounding of the earlier violation.

In the cited case (*State* v. *Calabro*), the issue of "illegal search and seizure" was not raised at the trial, though the trial took place three months after the *Mapp* decision. It was raised for the first time on appeal but the Appellate Division nonetheless did not deny all relief because of that failure, even though the State urged that the failure should preclude the raising of the point on appeal.

The Court remanded the case to the trial court for further inquiry as to the possible validity of the search notwithstanding the deficient warrant, because it concluded that the defendant should not be prejudiced by his counsel's misapprehension concerning the scope of the *Mapp* decision.

The Court in the *Calabro* opinion also referred to the holding of the New Jersey Supreme Court in the case of *State* v. *Doyle*, 40 N. J. 320 (1963) where the defendants failed to raise the question of the unlawful search and seizure not only at the trial level but also on the subsequent appeal to the Appellate Division as well. The point was raised for the first time on *argument* before the New Jersey Supreme Court, where the matter was before the Court on appeal as a matter of right. (In this we have the only distinction between the *Doyle* case and the present case; the present Petitioners had reached the Supreme Court without having raised the search and seizure question as a matter of grace on their Petition for Certification; it was denied without *argument* or opinion.)

In the *Doyle* case, *supra*, the New Jersey Supreme Court remanded the case to the trial court for the taking of testimony as to why the defendant had failed to raise the issue of illegal search at both the trial and appellate levels and as to whether the search and seizure could be validated on other grounds than the warrant.

Such action could and should have been the disposition of these Petitioners' appeal in their second appeal to the Appellate Division (A158-62).

POINT III

(a)

Petitioners also urge the Court to grant certiorari in this case that brings before this Court for the first time the question of whether the holding in *Mapp* v. *Ohio*, *supra*, is to be given a retroactive effect to State Court convictions that occurred prior to "*Mapp*", or as they may be designated, "pre-*Mapp*" convictions, where the State, at the time of the trial and conviction, was not following the exclusionary rule regarding illegally seized evidence which rule has been applied in the federal courts since *Weeks* v. *United States* (232 U. S. 383 (1914)), was decided.

Under this heading Petitioners urge, as a further reason for the Court to grant certiorari, the need to have resolved the conflict of decisions between the Fourth and Ninth Circuit Courts of Appeals on the one hand and the Fifth Circuit Court of Appeals on the other on this very question of whether *Mapp* v. *Ohio* is to be given retroactive effect to "pre-*Mapp*" convictions in the State Courts where the States were not following the exclusionary rule of *Weeks* v. *United States*, referred to above. This conflict of decision has become prominent by the latest decision of the Ninth Circuit Court of Appeals in *People of the State of California* v. *Hurst*, reported in 325 F. 2d 891. Advance sheets

of February 17, 1964, where rehearing was denied on January 27, 1964 and the opinion in that case published after the Petition for Certiorari in the present case was filed on January 9th, 1964. Earlier, the opinion of the Fourth Circuit Court of Appeals in *Hall* v. *Warden, Maryland Penitentiary*, reported in 313 F. 2d 483 (1963) cert. den. sub. nom. *Pepersack* v. *Hall*, 374 U. S. 809, 83 S. Ct. 1693, 10 L. Ed. 1032 (1963) also held that the holding of the Supreme Court in *Mapp* v. *Ohio* was to be given retrocative effect to "pre-*Mapp*" convictions where otherwise applicable.

The decision of the Fifth Circuit Court of Appeals in *United States, ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (1963) held that the ruling in *Mapp* was not to be applied retroactively to "pre-*Mapp*" convictions in the State courts in order to reopen the convictions, even though the evidence may have been illegally secured and illegally admitted into evidence at the trial, as the "illegality" of the seizure is now considered in the light of the *Mapp* holding.

That there exists conflicts of decisions on this question between the Circuit Courts of Appeals was recognized by the Ninth Circuit Court of Appeals in the Decision of *People* v. *Hurst, supra*, at page 894 of 325 F. 2d the Circuit Court itself stated the situation in the words appearing in footnote 1.

To resolve the substantial federal question presented by this Petition for Certiorari as well as to resolve the conflict of decisions now existing between the Fourth and Ninth

---

[1] "The keystone question in the instant case remains unresolved by the Supreme Court: whether the *Mapp* and *Ker* cases are to be given retroactive effect where, as here, the search, the trial, the motion to suppress, the denial thereof, the conviction, and the exhaustion or expiration of remedies of direct review occurred prior to June 19, 1961, the date of the Supreme Court's decision in Mapp."

Circuits on the one hand and the Fifth Circuit on the other, it is urged that this Court grant certiorari here rather than denying certiorari and relegating the Petitioners to bring their federal constitutional question before Federal Courts by returning to the State trial court and surrendering themselves for execution of the sentences imposed on them and then applying to the United States District Court for Habeas Corpus relief, with subsequent review by the Circuit Court of Appeals and a further application to this Court for Certiorari.

The question is substantial enough in itself without the presence of "conflict of decision" for the Court here to grant review by certiorari, particularly so since it is conceded by the State that the search warrant was deficient. The State courts are faced with the problem recurrently and have no adequate guide. The presence of the conflict of decisions is a further moving reason for the Court to act and why certiorari should be granted.

(b)

Because of the broad public impact of the question raised on this Petition for Certiorari and the nationwide effect that a resolution of the conflict of the decisions between the different Circuits would have, Petitioners, through their counsel, have called the attention of the Solicitor General of the United States to the present application by the Petitioners and that one of the grounds they would urge for the allowance of the Writ would be the "conflict of decisions" between the several Circuits. They have furnished to the Solicitor General a copy of their Petition for Certiorari, a copy of the Brief of the State of New Jersey in opposition thereto and a copy of this Reply Brief and have suggested to him that because of the importance of the question and the importance that a decision reached by this Court on the "conflict of decision" problem would have in the further

administration of the criminal law throughout the States, he might wish to file a brief as "*Amicus curiae*" or take some other action regarding this present application for certiorari.

CONCLUSION

For the reasons presented under the several separate headings it is urged that the Writ be allowed and that review be accorded.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Attorney for Petitioners.

APPENDIX AA

Application for Search Warrant

STATE OF NEW JERSEY }
COUNTY OF BERGEN } ss.:

On this 14th day of July, 1960, before me, the undersigned Judge of the Superior Court of the State of New Jersey, personally appeared Detective Robert W. Green of the New Jersey State Police, who, being duly sworn on his oath according to law, deposes and says—

1. I reside at New Jersey State Police Headquarters, in the Township of Ewing, County of Mercer, State of New Jersey.

2. I have good reason to believe, and do believe, that in and upon certain premises within the Borough of North Arlington, County of Bergen, State of New Jersey, to wit: premises known as 53 Forest Street, and more particularly described as follows: a one-story brick house with attached garage, occupied by and under the control of unknown persons, there have been and now are being conducted the illegal practices commonly known as bookmaking and maintaining a lottery in violation of the laws of the State of New Jersey, to wit: N.J.S. 2A:112-3 and N.J.S. 2A:121-3.

3. That the facts tending to establish the grounds for this application, and the probable cause of the deponent's belief that such grounds exist are as follows: Information given to the deponent to the effect that bookmaking and a lottery are being conducted within the above-described premises.

4. WHEREFORE, I respectfully move that a search warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

Detective ROBERT W. GREEN

(Sworn to July 14, 1960.)

APPENDIX BB

Search Warrant

STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

TO THE SHERIFF OF THE COUNTY OF BERGEN, AND TO ANY COUNTY DETECTIVE OF THE COUNTY OF BERGEN, OR TO ANY POLICE OFFICER OR TO ANY STATE POLICE OFFICER OF THE STATE OF NEW JERSEY:

WHEREAS, Detective Robert W. Green of the New Jersey State Police has this day made information on oath before me, Victor S. Kilkenny, a Judge of the Superior Court, State of New Jersey, that the illegal practices commonly known as bookmaking and maintaining a lottery, in violation of N.J.S. 2A:112-3 and N.J.S. 2A:121-3, are being carried on at the premises occupied by unknown persons, situated at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey, and that he, the said Detective Robert W. Green, has just and reasonable cause to suspect, and does suspect, that the illegal practices commonly known as bookmaking and maintaining a lottery are being carried on in a one-story brick house with garage attached, at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey.

These are, therefore, in the name of the State of New Jersey authorized and commanded to, with the necessary and proper assistance, enter into the said building by day, at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey, and there diligently search. And if you there shall find that the illegal practices commonly known as bookmaking and maintaining a lottery are being conducted, take into your possession all property,

including monies, used as a means of carrying on the illegal practices commonly known as bookmaking and maintaining a lottery which may be found on the said premises to the end that the same may be dealt with according to law.

You are further commanded in the event that you seize any of the above-described articles, to give a copy of this warrant together with a receipt for the property so seized to the person from whom it is taken or in whose possession it is found, or in the absence of such person to leave a copy of this warrant, together with such receipt, in the place where the said property is found.

You are further commanded to execute this warrant within ten days from the issuance hereof and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand on this 14th day of July, 1960.

/s/ VICTOR S. KILKENNY,
Judge of the Superior Court.

APPENDIX CC

Confiscated Items

County Clerk's Office
Hudson County, N. J.
Oct. 4, 12:20 P.M., 1962

7-14-60

The following items were confiscated from the premises of 53 Forest St. No. Arlington, N. J.

1 Bottle of medicine prescribed to J. Moriarty dated 7-10-59

1 vial of pills prescribed to J. Moriarty dated 1-9-60

$271,133.00 in strong box, also strong box

3,650.00 in drawer of bedroom

6,512.30 in cedar chest & china closet in room adjacent to kitchen

164.71 on Harry Kaiser's person

$281,460.01 Total (Correct count Total—$275,841.85)
(count taken by Treasurer's office)
F.P.C. M.B. E.S.U.

A quantity of loose change

1 R. C. Allen Adding Machine Ser. #1054286 taken from bedroom.

1 Victor electric adding machine Ser. #530494

1 Burroughs Add. Machine Ser. #B-38957

1 Remington Rand Add. Mach. Ser. #71-1340615

1 RCA Victor Radio Ser. #4048736

Appendix CC

1 Steelmast drawer type filing cabinet containing records of thousands of numbers plays.

1 Army Field Jacket

Numerous paper & cloth bags

5½ Boxes of envelopes

4 Boxes of note book fillers.

Thousands of slips of number plays.

2 Pink plastic waste-baskets with old slips & tapes.

1 Box containing adding machine tapes.

7 Shirts

DET. 2/c R. W. ALLEN, #762

(*Note*: The above is in longhand on return.)

APPENDIX DD

Hudson County Clerk's Certification

STATE OF NEW JERSEY

HUDSON COUNTY, ss:

I, JOHN GROGAN, Clerk of the County of Hudson aforesaid and also Clerk of the Hudson County Court (Criminal Branch) holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of Application for Search Warrant, Search Warrant and Return in the case of the State of New Jersey County of Bergen vs. Unknown Persons situated at 53 Forest Street, Borough of North Arlington, County of Bergen, as the same is taken from and compared with the original as filed and recorded in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, at Jersey City this Twenty-seventh day of January, 1964.

JOHN J. GROGAN,
Clerk.

(SEAL)

APPENDIX EE

Timetable of Proceedings

7-14-1960	Application for Search Warrant, Search Warrant Issued
7-14-1960	Search, Seizure and Arrest of Defendants
2-21-1961	Indictments returned
5-15-1961	Trial on Indictments commenced
5-18-1961	Verdict of Jury of Guilty and conviction
6-19-1961	Decision in Mapp v. Ohio, United States Supreme Court, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081
6-23-1961	Defendants sentenced on convictions
	Notice of Appeal to Appellate Division, Superior Court filed
	Brief and Appendix of Appellants filed,
11- 6-1961	Decision of Supreme Court of N. J. in State v. Valentin 36 N. J. 41, 174 A. 2d 737
2-26-1962	Argument of Appeal in State v. Kaiser, before Appellate Division of Superior Court of New Jersey
5-14-1962	Judgment and opinion of Appellate Division, Superior Court of New Jersey affirming conviction,
6- 4-1962	Decision of Supreme Court of New Jersey in State v. Smith, 37 N. J. 481,
6-25-1962	Printed Petition for Certification filed in the Supreme Court of New Jersey to review the

judgment of the Appellate Division of the Superior Court, (A-819-60) affirming the conviction of defendants.

9-17-1962 Petition for Certification to review judgment of Appellate Division, Superior Court, denied without oral argument or opinion,

10-26-1962 Motion filed by defendants with County Court of Bergen County to vacate judgments of conviction and to grant a new trial based upon the illegal search for and seizure of the proofs upon which the convictions were based and the insufficiency of the application upon which the search warrant was issued,

11- 9-1962 Argument on motion to vacate judgments of conviction, opinion denying motion to vacate judgments of conviction, and formal order denying motion to vacate judgments of conviction and for a new trial,

Notice of Appeal to Appellate Division, Superior Court from order of County Court denying motion to vacate etc. filed,

6-10-1963 Argument of Appeal in State v. Kaiser before Appellate Division of Superior Court of New Jersey from denial of motion to vacate judgments of conviction and for a new trial,

7-17-63 Judgment and opinion of Appellate Division, Superior Court, of New Jersey affirming denial by County Court of Motion to Vacate judgments of conviction and for a new trial,

Appendix EE

Printed Petition for Certification filed in the Supreme Court of New Jersey to review the judgment of the Appellate Division of the Superior Court (A-158-62) affirming denial by County Court of Motion to vacate judgments of conviction and for new trial,

11-26-1963 Petition for Certification to review judgment of Appellate Division, Superior Court, (A-158-62) denied without oral argument or opinion,

12- 9-1963 Application to County Court of Bergen County for a stay of execution of sentence to permit application to the Supreme Court of the United States for a Writ of Certiorari to review the judgments of the Appellate Division, Superior Court of New Jersey and of the Supreme Court of New Jersey denying Petitions for Certification,

12-11-1963 Order of County Court of Bergen County granting stay on condition that Petition for Certiorari be filed in the Supreme Court of the United States within 30 days of cember 9, 1963,

1- 9-1964 Petition for Certiorari to review the judgments of the Appellate Division of the Superior Court of New Jersey and the denials of the Petitions for Certification by the Supreme Court of New Jersey to review the said judgments of the Appellate Division, filed in the Supreme Court of the United States,

1-30-1964 Order of County Court of Bergen County extending stay of execution of sentence until the Supreme Court of the United States acts on the Petition for Certiorari filed with it.

APPENDIX FF

Order Extending Stay of Execution of Sentence

Application having heretofore been made to the Court on December 9th, 1963, for an order staying the execution of the sentences imposed upon the defendants, Harry J. Kaiser and Susan Kaiser, upon their convictions of the charges laid in the indictments returned against them to enable them to make application to the Supreme Court of the United States for a Writ of Certiorari to review the action of the Bergen County Court, Law Division (Criminal) in denying their application to vacate the judgments of conviction against them and for a new trial on said indictments and of the judgment and decision of the New Jersey Superior Court, Appellate Division, in affirming the said actions of the Bergen County Court, Law Division (Criminal), and of the denial by the Supreme Court of New Jersey of their Petition for Certification to review the action of the New Jersey Superior Court, Appellate Division, in affirming the said action of the Bergen County Court, Law Division (Criminal), on the ground that their conviction, being a pre-Mapp conviction, should be set aside because it was had in violation of their federal constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and that defendants had raised their federal constitutional questions at the earliest possible moment, based on the record made in this trial court at which they were convicted and had raised them in a proper manner but they had not been passed upon on the merits by the trial or appellate courts,

And the Court, on December 9th, 1963, having granted a stay of execution of sentence and having permitted the defendants to remain enlarged on bail, conditioned on their Petition for Certiorari being filed in the Supreme Court

Appendix FF

of the United States within thirty days after December 9th, 1963 and if so filed, to continue said stay until said Petition for Certiorari was thereafter acted upon by said Supreme Court of the United States,

And it now being represented to the Court by John J. Corcoran, Jr., attorney for said defendants, that due to printing difficulties, said printed Petition for a Writ of Certiorari was not filed in the Supreme Court of the United States within thirty days from December 9th, 1963, namely January 8th, 1964, but was filed in said Supreme Court of the United States at 9 a.m. on January 9th, 1964, a period of sixteen hours later, and application having been made herefor and not objected to by the Prosecutor of the Pleas of Bergen County, New Jersey,

It is, on this 30th day of January, 1964,

ORDERED that the stay of execution of sentence on the defendants on their convictions be extended until the Supreme Court of the United States acts upon the Petition for a Writ of Certiorari filed with it by said defendants, Harry J. Kaiser and Susan Kaiser, on January 9th, 1964.

/s/ BENJAMIN P. GALANTI,
BENJAMIN P. GALANTI,
J. C. C.

I have no objection to the entry of the foregoing Order.

/s/ GUY W. CALISSI,
GUY W. CALISSI,
Prosecutor of the Pleas of
Bergen County, New Jersey.